

N. 2992

**No. 14,509**  
**United States Court of Appeals**  
**For the Ninth Circuit**

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CHARLES H. MARTIN,

*Appellant,*

vs.

BE-GE MFG. Co., of Gilroy, a corporation,  
and ALBERT G. GURRIES,

*Appellees.*

**BRIEF ON BEHALF OF APPELLEES.**

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## BRIEF ON BEHALF OF APPELLEES.

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### STATEMENT OF THE CASE.

The plaintiff-appellant, Charles H. Martin, hereinafter called "Martin", brought this action for infringement of claims 10 and 11 of United States Letters Patent No. 2,014,479 which was granted to him on September 17, 1935 for a "Land Leveler". As shown in the Martin patent, Exhibit 6, the Martin device consists of a scraper which is pivotally connected to a frame which, in turn, is connected to a tractor. When the scraper is drawn over the surface of the ground in digging or loading position, it is unsupported by its wheels. As the device fills, the earth allegedly engages the overhanging lip 21a (shown

in Figure 4 of the Martin patent) and the inventor claims that the upward pressure of the earth against the lip 21a limits further digging and actually lifts the scraper.

The allegedly infringing device was manufactured and sold by the appellee, Be-Ge Mfg. Co., of Gilroy, California, hereinafter called "Be-Ge". The other appellees are Albert G. Gurries, the president of Be-Ge Mfg. Co., and Sidney S. Johnson, an attorney in Gilroy, California, who was one of the incorporators and an early officer. The Be-Ge device consists of a scraper which is rigidly welded to the frame which is adapted to be connected to a tractor and drawn over the ground. The scraper is at all times supported by its wheels and the only force controlling the ground penetration and lifting of the scraper is the control exerted by the operator who controls the position of the scraper with respect to the wheels. There is a frame member across the back of the scraper and it is the appellant's contention that this frame is similar to his forwardly extending lip 21a. The appellees contend, and proved to the satisfaction of the trial judge that any dirt which engages this frame member does not exert sufficient pressure to be of any effect and, therefore, the function of the appellant's lip as specified in the appellant's claims 10 and 11, is not present in the Be-Ge device.

The case was tried before the Honorable Dal M. Lemmon in San Francisco and consumed three full trial days. Briefs were filed on behalf of both parties and Judge Lemmon, after having given due consider-



ation to the briefs, entered a Memorandum and Order on June 8, 1954 which stated in part:

“The Court is persuaded that the patent in question is not an inventive advance over the prior art and that the accused structure does not infringe.”

Findings of Fact and Conclusions of Law and a Judgment were entered by the learned trial judge, and it is from this Judgment that this appeal was taken. The Findings and Conclusions from which an appeal has been taken are set forth at appropriate places in this brief.

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#### **THE APPELLEES' POSITION.**

It is the appellees' position that the Findings of Fact and Conclusions of Law are amply supported by the evidence and that the learned judge was correct in determining that the accused Be-Ge device does not infringe the Martin patent and that the Martin patent is invalid.

However, before embarking upon an analysis of the Findings of Fact and Conclusions of Law and the evidence which supports them, the appellees believe that an explanation of the patent in suit, its limitations, and the accused Be-Ge devices, is in order.

## THE PATENT IN SUIT.

### Introduction to the Land Leveling Art.

The art of handling and leveling earth reaches back into the early days of man and even today, man is confronted with the same problems of leveling the earth and making borders and ditches for irrigation. The prior art shows that the land leveling art is a well developed one.

For example, the patent to Scholder No. 1,341 (Exhibit E) dated September 25, 1839, illustrates a device which is provided with a scraper identified by the letter "A" which hangs on pivots so that it can be pivoted with respect to the frame into and out of digging position. When the member "A" is in such a position that its cutting edge engages the ground, earth will be scraped into it. When it is desired that the scraper be dumped, it may be rotated about the pivots "S" and the accumulated earth will simply fall out by gravity. The wheels "C" are controlled by a lever and are adapted to raise and lower the frame "H".

The art then advanced through devices of the type shown in Langdon Patent No. 54,373 dated May 1, 1866, and Wood Patent No. 265,295, dated October 3, 1882. These devices were small and crude, were adapted to be drawn by horses or oxen, and were usually made of wood strengthened by metal straps and braces; but they apparently worked.

The art then progressed through the years, as indicated by the book of prior art (Exhibit E) introduced by Be-Ge, until by the time Martin entered the



field there were so many different types of levelers and scrapers that, in all fairness, it must be said that the field in which the appellant labored was a well worked one. Moreover, a reading of Martin's patent and file wrapper, Exhibit D, reveals that Martin himself recognized this. Martin indicated that there were at least two types of scrapers and that his invention related to an improvement on only one of them, to-wit, that type in which the scraper "when in scraping positions, rests directly on the ground and is unsupported by the wheels—". (Pat. p. 1, c. 1, l. 23.)\* To one unfamiliar with the art this would appear to be of little significance, but Martin went on to distinguish his device from another admittedly old and well known type classified in his patent, p. 1, c. 1, l. 12, where he stated:

"Heretofore the customary manner of mounting the scraper for such tilting movement has been to support it on wheels so arranged as to carry the scraper in all its scraping positions. That is to say, in the usual type of land leveler, the wheels ride on the ground, not only when the scraper is out of engagement with the ground, but when it is in scraping positions as well."

So in the Martin device, the wheels are *off* the ground and *do not* support the scraper during the scraping operation whereas "in the usual type of land leveler", the wheels are *on* the ground and *do* support the scraper during the scraping operation.

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\*Reference to the Martin Patent will be Pat. p. ...., c. ...., l. ...., wherein "p." refers to page; "c." to column, and "l." to line.

This distinction is important. *This is so because the Martin scraper is of one type and the accused Be-Ge scraper is of another.*

The Court's attention is respectfully directed to Figures 1 and 2 of Appellee's Exhibit C wherein the above described difference is made clear. Figure 1 shows the Martin device and Figure 2 shows the prior art as exemplified in Hauser patent 1,759,982.

Figure 1 of defendant's Exhibit C illustrates the Martin structure. The draft frame is colored yellow. The scraper is colored purple, blue, red and green. The scraping edge and bottom part of the scraper is purple, the rear part of the scraper is blue and the red part is the forwardly extending lip. It will be noted that the scraper is tiltable with respect to the yellow draft frame. The black wheels engage the ground only when the scraper is in dumping position and then only for the purpose of spacing the cutting edge a predetermined distance from the ground so that the dirt which spills out of the scraper will be spread to a predetermined level. The depth to which the cutting edge digs is not determined by the wheels, since the Martin scraper, when in scraping position, engages the ground only with its cutting or scraping edge and is unsupported by the wheels. This is the type of device which the appellant defines as his.

The prior art Hauser structure is shown in Figure 2. The yellow frame is supported at its forward end by a draft vehicle or tractor. The draft frame is pivotally connected to an orange colored lever to one end of which there is secured a pair of black wheels.

By moving the lever about the yellow pivot at its center, the draft frame and cutting edge will be raised and lowered. The scraper is permanently secured to the draft frame and is not pivoted or tiltable with respect thereto. The draft vehicle or tractor and the black wheels on the scraper define a plane and the position of the purple cutting edge with respect to the plane is determined by raising and lowering the frame. This is the type of device which the plaintiff stated to be old when he states: "Heretofore the customary manner of mounting the scraper for such tilting movement has been to support it on wheels so arranged to carry the scraper in all its scraping positions. That is to say, in the usual type of land leveler, the wheels ride on the ground not only when the scraper is out of engagement with the ground but when it is in scraping positions as well." (Martin Pat. p. 1, c. 1, l. 12.)

Thus it will be seen that the Martin device belongs to one family of scrapers and the Hauser structure, for example, belongs to another family of scrapers.

It is Be-Ge's contention that its structure is classified with the Hauser type and not with the Martin type.

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#### **THE APPELLANT'S ALLEGED INVENTION.**

An analysis of Martin's patent clearly supports our position.

We have shown that in his patent, Martin carefully and correctly locates his invention in the crowded

field in which he is working and characterizes it as belonging to a specific class. In addition, during the prosecution of his application and in order to distinguish over prior art devices, Martin made certain limiting arguments to convince the Patent Office that the claims should be granted to him (Exhibit D, p. 34, paper No. 5):

“Before taking up the claims individually, the characteristic differences of applicant’s device over the art will be described. With the exception of the patent to Throop, most of the references cited so far in the prosecution show devices belonging to the general *class of implements in which the scraper is carried at all times upon wheels*, regardless of whether the scraper is in loading or unloading position. Throop shows wheels mounted upon the draft frame and adapted to support the scraper and frame when the scraper is in the scraping or loading position. From a consideration of Fig. 2 of this patent, it will be seen that when the scraper is tilted into the unloading position the wheels are lifted clear of the ground and the weight of the implement is then carried upon the end walls of the scraper. “In contrast with this method of operation, it is to be noted that in applicant’s device the wheels are mounted upon the end plates of the scraper eccentric to the axis about which the scraper tilts relative to the frame. The point of mounting the wheels is so located that when the scraper is in the loading or scraping position the wheels are raised clear of the ground and the entire weight of the scraper and draft frame rests upon the cutting blade of the scraper to force this blade into the ground. Overloading of the scraper re-



sulting from excessive penetration of the blade is prevented by the upward force directed against the forwardly inclined back of the scraper by the soil accumulated in front of the scraper. When the scraper is tilted into the dumping or spreading position, the carrying wheels are brought into contact with the soil; and continued forward tilting of the scraper bowl increases the distance between the ground surface and the scraper blade. By this means the thickness of the dirt layer may be controlled." (Emphasis added.)

The appellant further sought to impress this difference upon the Patent Office when he stated (Exhibit D, p. 50):

"One must be careful to distinguish between bringing the wheels into ground engagement by or as a result of tilting the scraper and between tilting or moving the scraper subsequent to or as a result of wheel engagement with the ground as is true in both McMillan and Bernard as well as most of the other cited art. There is not only a distinction but a difference since there is a different mode of operation in the two cases. By using the first mode of operation, applicant is enabled to operate the scraper and control its position relative to the draft frame and relative to the ground without requiring the wheels to rest upon the ground."

Martin also quite clearly defined the term "tiltably movable" when he stated (Exhibit D, p. 49):

"Claims 22, 24 and 25 specify the scraper as being tiltably movable whereas in McMillan the scraper has no true tilting movement but is rigidly at-

tached to the draft frame and consequently has a vertical or a lifting movement.”

The expressions “tiltably movable” and “attached to the rear end of the draft frame and adapted when loading to rest on the ground to support the draft frame” in claims 10 and 11, clearly call for a particular structure and are essential limitations to the claims.

The Martin structure, not being supported by wheels during the scraping operation, would tend to dig into the ground without restraint, and in order to prevent this, Martin apparently decided that he must provide some substitute for wheels.

The problem of uncontrolled digging is first suggested on p. 1, c. 1, l. 29 of the Martin patent:

“To counteract the tendency for the scraper to penetrate the soil beyond desired depths, due to the load imposed by the weight of the scraper itself and that of the frame parts connected therewith, I provide means whereby a balancing or lifting effect is had on the scraper such as will prevent its becoming overloaded and assure even penetration.”

The appellant describes this structure (reference numeral 21a) and its mode of operation by stating (Pat. p. 2, c. 2, ll. 17-50):

“As the scraper fills, the weight of the soil adds to the initial loading and is normal to the scraper surface at all points. The result is a tendency for the blade to follow the line of least resistance and to penetrate directly into the soil in the same



direction that it is inclined. To counteract this tendency the top of the scraper back is curved as at 21a so that the pressure of the dirt against this curved surface is upward and opposes the downward load on the blade edge. The reaction against curved surface 21a is substantially parallel to the bottom 22.

“The result of this construction is that the blade at first digs into the soil because of the scraper weight and the soil pressure; but once the scraper is loaded, the pressure against the curve 21a is sufficient to prevent too deep penetration of the blade as a result of the load of soil.”

Frankly, we do not believe that the forwardly extending lip has any value or utility, as we will show later, but, even if it has, it was not new with Martin since we find the alleged phenomenon described in the Bunch Patent No. 1,783,941 (Exhibit E), particularly p. 1, c. 1, l. 55-70 which states:

“Another object of this invention is to provide a tractor attachment employing a blade, scraper or grading member which is adapted to be mounted in advance of the tractor and which is constructed to prevent the same digging in below a determinate depth during the grading, back filling or bulldozing or the like, due to the upward pressure of the material moved by said member.”

On page 2, c. 2, l. 94 to 101 Bunch makes clear his method of doing this and states:

“The pressure upwardly of the material against the upper overhanging portion 38 of the blade member, effectually prevents the blade member from digging into the material beyond the normal

capacity of the blade member, and hence, when once loaded, it will remain loaded during the entire period of its forward movement."

The member 38 is illustrated in both Figures 1 and 3 and is the top forwardly curved portion of the scraper member 37.

Thus Martin has only adopted what has been referred to in the prior art as being a means for preventing a blade from digging too deeply into the dirt and has used this member on a specific type of scraper.

*Be-Ge will show that it uses neither.* We will show that the Be-Ge scraper blade is rigidly secured to the draft frame and is *not tiltable* with respect thereto. The Be-Ge device is at *all times*, including the loading cycle, supported upon its wheels. Be-Ge simply does not make use of the lifting effect. If the effect existed it would be contrary to the mode of operation desired by Be-Ge, to-wit, accurate positioning of the device under the sole control of the operator and not under the control of some outside force. (Tr. p. 293 and p. 325, as quoted on pages 36-38 of this Brief.)

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#### THE BE-GE DEVICE.

The alleged infringing device is shown in Figure 3 of Exhibit C. It consists of a yellow draft frame which is connected to a vehicle such as a tractor by a draft connection shown at the extreme left hand side of the drawing. The scraper consists of a pair of green side walls and a purple scraper with a dark

blue upwardly extending back. An orange colored lever, which is pivoted at the back of the yellow frame, carries a pair of black wheels. When the orange colored lever is pivoted about the yellow pivot the frame and scraper will be raised or lowered because the wheels are in constant engagement with the ground. The yellow frame, green side walls, purple scraping blade and blue back portion are all welded together and form a single solid, rigid unit, so that the scraper is *not* movable with respect to the yellow frame.

When the Be-Ge device is drawn to the left as viewed in Figure 3 of Exhibit C, its purple scraping blade will engage the ground and scrape dirt upwardly, but the depth to which the purple blade cuts into the ground will be predetermined because the black wheels always rest on the ground and the depth of the cut is under the control of the operator and is not subject to any other force. When a load has been obtained or when the desired amount of dirt has been collected, hydraulic fluid under pressure is injected into the brown cylinder with the result that the upper end of the orange colored lever will be urged to the right. This will lift the yellow frame and the purple blade and the earth will pass under the raised blade and be spread to a depth determined by the cutting edge.

**THE FINDINGS OF THE DISTRICT COURT ARE CORRECT.**

This case was tried before the Hon. Dal M. Lemmon who had the opportunity of observing the witnesses and of determining their credibility.

There was conflicting evidence on substantially every point of the case. The appellant, Mr. Martin, testified extensively on his own behalf, and during his rebuttal contradicted everything that had been said by the appellees' witnesses. Needless to say, the appellees hotly contested every assertion of validity and infringement.

We believe it would serve no useful purpose to set forth the conflicting testimony relating to matters of validity and infringement in this brief, because we believe that all points are clearly set forth in the briefs of both parties. We feel that in situations of this type, the position of the Court should be that set forth in *National Reserve Insurance Co. of Illinois v. Scudder*, C.C.A. 9, 71 Fed. 2d 884 at pp. 887-8.

"It would serve no useful purpose to set forth the conflicting testimony relating to payment of the mortgage, because after an examination of the record, we feel bound by the well-settled rule that the findings of the Chancellor, based on conflicting evidence, are presumptively correct and will not be set aside unless a serious mistake of fact appears."—See *Coats v. Barton* CCA 8, 25 F 2d 813, 815; *Grace v. Tannehill* CCA 5, 54 F 2d 1059, 1061; *Clarke v. Hot Springs Electric Light & Power Co.* CCA 10, 55 F 2d 612, 615; certiorari denied 287 U. S. 619, 53 S. Ct. 19, 77 L. Ed 537; *Klaber v. Lakenan* CCA 8, 64 F 2d 86, 89, 90 A.L.R. 783; *Suburban Improvement Co. v. Scott*



Lumber Co. CCA 4, 67 F 2d, 335, 336, 90 A.L.R. 330.”

We also believe that while it is true that on an appeal this Court must examine both the law and the facts, the Court ought not to disturb the Findings of Fact of the trial judge, especially where the evidence is conflicting and the credibility of witnesses is involved. *Malloy et al. v. New York Life Insurance Co.*, CCA 1, 103 Fed 2d 439; *Storley et al. v. Armour and Co.*, CCA 8, 107 Fed. 2d 499; *United States v. Appalachian Electric Power Co.*, CCA 4, 107 Fed 2d 769; *Occidental Life Insurance Co. v. Thomas*, CCA 9, 107 Fed 2d 876.

As O'Brien states in his *Manual of Federal Appellate Procedure*, 3rd ed., 1941, page 19:

“The provisions of the new procedural rules that the Findings of Fact of the Trial Judge are to be accepted on appeal unless clearly wrong under Rule 52a is but the formulation of a rule long recognized and applied by courts of equity.” *Guilford Construction Co et al. v. Biggs*, CCA 4, 102 Fed 2d 46; *Wittmayer et ux v. United States*, CCA 9, 118 Fed 2d 808.

O'Brien further states on page 20:

“Where there is a conflict in the evidence and the court below reached its conclusions by determining the right of the evidence and the credibility of the witnesses and giving due regard ‘to the opportunity of the trial court to judge of the credibility of the witnesses’, the appellate court will not say that the findings are ‘clearly erroneous’ ” citing *Cherry-Burrell Co. et al. v. Thatcher*, CCA 9, 107

F 2d 65, 69; *Maryland Casualty Co. v. Stark*, CCA 9, 109 F 2d 212, 214; *Dant & Russell v. J. D. Halstead Lumber Co.*, CCA 9, 103 F 2d 306; *Weber et al. v. Alabama-Calif. Gold Mines Co. et al.*, CCA 9, 121 F 2d 663 . . ., July 11, 1941."

The trial Court properly rejected the assertions of the inventor and it should be noted that the Court made a finding which inferred that the Plaintiff's claims were extravagant (Finding of Fact No. 8). It is also clear that the learned Trial Judge accepted the evidence introduced on behalf of Be-Ge.

We will show that the Findings of Fact are clearly supported by the evidence.

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#### THE PATENT IN SUIT IS INVALID.

The Honorable Dal M. Lemmon made the following Findings of Fact and Conclusions of Law regarding validity.

##### *Findings of Fact*

##### 5.

That the claims of the patent in suit do not meet the affirmative tests of invention which have been announced by the courts.

##### 6.

That said United States Letters Patent No. 2,014,479 is invalid and void in:

(a) That long prior to the alleged invention by the plaintiff and more than two years prior to the date of the application which matured into



said Letters Patent, the alleged improvements or all material and substantial parts thereof had been patented and described in the following patents in evidence, to-wit:

Scholder	1,341	September	26, 1839
Langdon	54,373	May	1, 1866
Beach	163,842	June	1, 1875
Palmer	225,637	March	16, 1880
Wood	265,295	October	3, 1882
Savage	804,625	November	14, 1905
Lage	1,296,295	March	4, 1919
Spreyer	1,343,097	June	8, 1920
Adams	1,435,575	November	14, 1922
Spreyer	1,633,464	June	21, 1927
McMillan	1,713,048	May	14, 1929
Hauser	1,759,982	May	27, 1930
Bunch	1,783,941	December	2, 1930
Ricks	1,806,219	May	19, 1931
Bird	1,808,733	June	2, 1931
Lytle	1,822,051	September	8, 1931
Le Bleu	1,826,252	October	6, 1931

(b) That each component or element of the claimed combination in the two claims of the Letters Patent sued upon is old and was old in the art more than two years prior to the date of the application which matured into said Letters Patent.

(c) That each component or element of the claimed combinations in the two claims of the Letters Patent sued upon contributes and performs only that function which it had performed in the prior art and there is nothing in any of the claims beyond the addition of one old element to another old element to make up the assemblage of parts without integration.

(d) That the total result or function of the elements (each of which is old), of each of the

combinations set forth in the two claims sued upon is a summation only of each one of the individual components or elements and is not something beyond that.

(e) That no unusual, unexpected or surprising consequences flow from the unification of the old elements described and claimed in the two claims of the Letters Patent sued upon.

7.

That the device described and claimed in claims 10 and 11 of the patent in suit is not an inventive advance over the prior art and did not involve more than the exercise of ordinary mechanical and engineering skill and knowledge and did not require invention.

8.

There is no justification in the record for the extravagant claims of the plaintiff that striking and surprising consequences flow from the unification of the several old elements described and claimed in the two claims in the Letters Patent sued upon.

9.

That the plaintiff's own testimony reveals that the alleged inventive concept is not so clearly described in the Letters Patent in suit as to enable a person skilled in the art to make or use the same.

*Conclusions of Law*

II.

That claims 10 and 11 of United States Letters Patent No. 2,014,479 are, and each of them, is invalid.

### THE PRIOR ART.

We believe that a discussion of the prior art will clearly show that Findings 6, 7 and 8 are correct and are supported by the weight of the evidence.

The patent to Adams, No. 1,435,575 dated November 14, 1922, illustrates a device having a scraper 8 which is tiltable (about point 11) with respect to the draft frame 1. A hydraulic mechanism illustrated in Figure 2 serves, through cables 20 and 26, to tilt the scraper. The rear wall 8 is provided with a forwardly curving extension at the top. (Tr. p. 107.) Adams does not describe the lifting action claimed by Martin, but the scraper 8 has a forwardly curving extension which is startlingly similar to the shape of the forwardly curving extension (Appellees' Exhibit V) which Mr. Cantonwine testified was the genesis of the alleged invention. (Tr. p. 370.) It seems far fetched that in devices which are otherwise substantially identical, the addition of substantially identical forwardly curving extensions would not produce identical results.

The patent to Beach, No. 163,842 dated June 1, 1875, illustrates a device which is similar to Martin's in that a scraper A is provided which has side walls to which wheels F are secured. The scraper is tiltable with respect to the frame B and the scraper is provided with a forwardly curving extension. (Tr. p. 110, l. 23.)

Bird patent No. 1,808,733 shows, in Figure 3, a forwardly extending curved upper portion (Tr. p. 112, l. 5), like McMillan and Beach, but does not describe any lifting effect therefrom. Bird's forwardly

extending upper portion is similar to Cantonwine's drawing (Exhibit V) and similar to Adams.

The patent to Hauser, No. 1,759,982 granted May 27, 1930, is provided with a forwardly extending cross member. (Tr. pp. 96-7.) However the Hauser device is not tiltable in the same manner as the Martin device but is substantially identical to the Be-Ge device and is of the general type which is stated by Martin in his specification as being of an older type. (Tr. pp. 81-83.) Note the testimony of the witness Doble on pages 87 to 106 wherein that witness analyzed the claims of the patent in suit and applied them to the Hauser structure and to the Be-Ge structure and showed (1) the claims not to be infringed and (2) to be readable on the Be-Ge device *only* if also and equally readable on the Hauser device. This being so, if Be-Ge infringes, so does Hauser and the claims are invalid because that which infringes if later, anticipates if earlier. *Peters v. Active Mfg. Co.*, 129 US 530-537, 32 L.Ed. 738; *Knapp v. Morss*, 150 US 221, 228, 37 L.Ed. 1059; *Miller v. Eagle Mfg. Co.*, 151 US 186, 200, 38 L.Ed. 121.

The patent to Bunch, No. 1,783,941 dated December 2, 1930, recognizes the phenomenon claimed by Martin. (Tr. p. 141, ll. 14-17.)

In describing his device the inventor states:

"The pressure upwardly of the material against the upper overhanging portion 38 of the blade member effectually prevents the blade member from digging into the material beyond the normal capacity of the blade member and hence, when



once loaded, it will remain loaded during the entire period of its forward movement.” (Bunch patent, p. 2, c. 2, l. 94.)

Assuming such a phenomenon exists, it was recognized long before Martin made his alleged invention and was known to those skilled in the art. The mere adaptation of a known expedient to a known device is, as is so succinctly indicated in the A & P case, merely adding two and two and still getting four. *Great Atlantic and Pacific Tea Co. v. Supermarket Equipment Corp.*, 340 US 147.

The patent to Lage, No. 1,296,295 dated March 4, 1919, illustrates a device whose scraper member is provided with an upwardly extending back curving forwardly at its top. (Tr. p. 135, l. 11.) Here again, we find a device which differs from the claims of the patent in suit only in that the scraper element is not tilt-able in the same manner as is the scraper element of the patent in suit. However, the scrapers of Hauser, McMillan, and Be-Ge are likewise deficient in this regard.

The patent to Langdon, No. 54,373 dated May 1, 1866 illustrates a device which is similar to Be-Ge’s device (Tr. p. 115, l. 2 to p. 116, l. 25), in that the scraping element is rigidly secured to the frame and is not pivotally connected thereto. However, like the Be-Ge device, it is provided with a forwardly extending portion P which is a part of the frame. In this manner Langdon, Hauser and Be-Ge (to name a few), are identical and the claims of the patent in suit read

upon Langdon in the same manner as they read upon the Be-Ge structure. That which infringes if later anticipates if earlier.

The patent to Lytle No. 1,822,051 dated September 8, 1931, shows a forwardly extending upper portion on its scraper element. (Tr. p. 142, ll. 12-16.) The scraper is pivoted with respect to the frame and is not secured rigidly thereto as it is in the Be-Ge or Hauser devices.

The patent to McMillan No. 1,713,048 dated May 14, 1929, shows a device which is similar to the Be-Ge device in many critical and important ways. A study of McMillan reveals that the frame is rigidly secured to the scraper element like Hauser's and Be-Ge's. The wheels on the McMillan structure are pivotally connected to the scraper in substantially the same manner and operated by a hydraulic jack in substantially the same manner as Hauser and Be-Ge. It is apparent, therefore, that if the movement of McMillan's scraper can be differentiated from Martin, so can Hauser's and Be-Ge's. During the prosecution of the patent application the appellant's counsel criticised McMillan in the following language:

"Assuming for the purposes of argument that the scraper blade is resting upon a hard surface like a concrete floor, it will be admitted that the wheels of McMillan may be raised off the ground; but it is submitted that such ground disengagement is contrary to the actual mode of operation of the scraper and is contrary to the necessary implications of the patent description." (Paper No. 8, dated April 18, 1933 of Exhibit D, p. 48.)



This was in answer to the Examiner's statement that the wheels of McMillan "may be raised from the ground as the scraper blade is tilted into scraping position", and that "as the scraper is tilted out of ground engagement the wheels move into engagement with the ground". (Paper No. 6 dated October 6, 1932, Exhibit D, p. 44.) Thus, in refuting the Examiner's statement which is the very argument which he is advancing here (that the Be-Ge structure may be operated in an infringing manner), Martin argued that such ground disengagement is contrary to the actual mode of operation of the scraper and is contrary to the necessary implications of the patent description. This argument was made for the purpose of obtaining the claims of the patent in suit and is a definite limitation upon the claims as it was accepted by the Examiner in granting the claims.

Furthermore, Martin argued that "Claims 22, 24 and 25 specify the scraper as being tiltably movable whereas in McMillan the scraper has no true tilting movement *but is rigidly attached to the draft frame and consequently has a vertical or lifting movement.*" (Paper No. 8, dated April 18, 1933, Exhibit D, p. 49.) Therefore when claim 10 calls for a tiltably movable scraper or "an adjustable scraper tiltably movable into and out of engagement with the ground" it calls for a definite type of scraper and not for a leveller whose scraper is rigidly connected to the draft frame.

The patent to Scholder No. 1,341 dated September 25, 1839 shows a device which illustrates all the ele-

ments of claim 10 and differs only therefrom in that Scholder does not specifically state in his specification that excessive soil penetration of the scraper bottom is prevented by a lifting force on the scraper. However this action is described in the Bunch patent. A glance at Bunch's scraper reveals that it is similar in shape to that of Scholder and if the alleged phenomenon exists in the Bunch structure it should also exist in Scholder.

The patent to Savage, No. 804,625 dated November 14, 1905, shows a device which is adjustable into and out of engagement with the ground in the same manner as Hauser and Be-Ge and which is rigidly secured to its draft frame. (Tr. pp. 118 to 120 incl.) It, too, is provided with a forwardly extending member 10 which is defined as a deflector to prevent the dirt from crowding over the upper edge of the scraper.

The Wood patent No. 265,295 dated October 3, 1882 illustrates a scraper blade which is rigidly secured to the draft frame and which is movable into and out of engagement with the ground in the same manner as Hauser and Be-Ge. (Tr. p. 122.) It is provided with a forwardly extending member F. The angle of the member F with respect to the angle of the scraper is (1) substantially identical to the angle of the device which the witness Cantonwine indicated was affixed to the rear of the appellant's device at Lido Isle, is (2) substantially identical to the angle of the appellees' cross frame member and is (3) substantially identical to the forwardly extending upper portion of

the Adams patent. If the phenomenon exists with respect to one, it exists with respect to all.

The only claims herein involved are claims 10 and 11 which are shown in Appellees' Exhibits A and B wherein they were broken down as follows:

### Claim 10

A land leveler comprising

1. An adjustable scraper  
tiltably movable  
into and out of engagement with the  
ground,
2. And means  
to tiltably operate the scraper;  
said scraper comprising
  - (A) An inclined bottom portion
  - (B) And an upwardly extending back
  - (C) Curving forwardly at its top to  
produce a lifting force on the  
scraper when the fully loaded  
scraper is drawn forward,

Whereby excessive soil penetration  
of the scraper bottom is prevented.

### Claim 11

In a tractor drawn land leveler of the character  
described,

1. A draft frame  
pivotally connected at its forward end  
to the tractor
2. And a scraper  
attached to the rear end of the draft  
frame and adapted when loading to rest

on the ground to support the draft frame;  
 said scraper  
 comprising

- (A) A transversely extending, inclined bottom portion,
- (B) Forwardly extending end walls,
- (C) And an upwardly extending back
- (D) Curving forwardly at its top to produce a lifting force on the scraper when the fully loaded scraper is drawn forward, said lifting force limiting the soil penetration of the scraper bottom

The elements of the claims of the patent in suit are all found in the prior art.

Each of the prior art patents show a land leveler.

Claim 10 calls for an adjustable scraper tiltably movable into and out of engagement with the ground. This element is found in Adams patent No. 1,435,575, Beach patent No. 163,842, Lytle patent No. 1,822,051 and in Scholder patent No. 1,341. (Tr. p. 143, ll. 12-14, incl.)

The element defined as "said scraper comprising an inclined bottom portion and an upwardly extending back curving forwardly at its top" is found in the Adams patent, the Beach patent, Bird patent No. 1,808,733 and the patent to Bunch No. 1,783,941, as well as the Hauser patent No. 1,759,982, Lage patent No. 1,296,295, Langdon patent No. 54,373, Lytle patent No. 1,822,051, McMillan patent No. 1,713,048, Scholder



patent No. 1,341, Savage patent No. 804,625 and Wood patent No. 625,295. (Tr. p. 144, l. 15 to p. 145, l. 12.)

The limitation of the claim defined as "to produce a lifting force on the scraper when the fully loaded scraper is drawn forward whereby excessive soil penetration of the scraper bottom is prevented" is found and is described in the patent to Bunch. (See Bunch Pat. p. 2, c. 2, ll. 94 to 102.)

Claim 11 defines a device comprising a "scraper attached to the rear end of the draft frame and adapted when loading to rest on the ground to support the draft frame." In claims 23, 24 and 25 of the patent application the inventor used the following expression: "said scraper being in weight supporting contact with the ground when in scraping position." In the prosecution of the patent application and particularly in paper No. 8 dated April 18, 1933, when speaking of this limitation, the appellant stated (Exhibit D, p. 50):

\* \* \* \* \*

"One must be careful to distinguish between bringing the wheels into ground engagement by or as a result of tilting the scraper and between tilting or moving the scraper subsequent to or as a result of wheel engagement with the ground as is true in both McMillan and Bernard as well as most of the other cited art. There is not only a distinction but a difference since there is a different mode of operation in the two cases. By using the first mode of operation, applicant is enabled to operate the scraper and control its position relative to the draft frame and relative to the ground without requiring the wheels to rest upon the ground."

From the foregoing it is obvious that the limitation in claim 11 is identical to the “tiltably movable” in claim 10 and that this is a necessary and desirable limitation as pointed out by the appellant. To the same extent, therefore, this limitation is found in the prior art.

It will be noted that a scraper which is defined as “tiltably movable” is not found in Hauser and McMillan. However, if Martin interprets the claims which are sued upon in a way which is contrary to his file-wrapper arguments (but which must be indulged in by him to substantiate his claim of infringement) then, and in that event, we will find that Hauser and McMillan also infringe. So interpreted, the claims, reading on prior art, are invalid.

It is apparent from the foregoing that each and every element of the patent in suit is old. The utilization of an old element to take advantage of a phenomenon found in nature does not produce a new and unexpected result and there is certainly no invention. On the contrary it is the type of patent which was condemned by the United States Supreme Court in the *A & P* case or, in other words, the old matter of two plus two equals four—no more. (*Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corporation*, 340 US 147.)

Finding 9 is supported by the evidence.

On rebuttal Mr. Martin testified with considerable firmness that none of the prior art devices disclosed



his inventive concept. For example, he bluntly stated that Adams (Tr. p. 418), Beach (Tr. p. 419), Bird (Tr. p. 420), Langdon (Tr. p. 420), Savage (Tr. p. 421), Wood (Tr. p. 422), Lage (Tr. p. 423), Bunch (Tr. p. 424) and Lytle (Tr. p. 426), all failed to disclose his concept.

On cross examination, however, he was unable to define his inventive concept and show where it was disclosed in his patent. (Tr. pp. 427 to 439.) This testimony is too lengthy to quote but the following is typical. (Tr. p. 427, l. 19 to p. 429, l. 6.)

Q. Well, Mr. Gabriel has just been saying "Does this patent disclose your concept." and I would like to know what is your inventive concept?

A. That would be, the concept, the design of the bowl with the lower rear inclined portion, from there to the central or vertical portion, and from there to a forwardly inclined portion or baffle known as "I".

Q. Now, then, it is the combination then of a lower rearwardly inclined portion and a central vertical inclined portion and a forwardly inclined top portion, is that right?

A. That is right.

Q. Well, now you just—let's see. Let's just take Hauser. Doesn't Hauser have a lower rearward inclined portion, a central vertical portion, and a forward inclined baffle?

A. Not in proportion to mine.

Q. Well, now, just a minute. What do you mean, not in proper proportion to yours?

A. It isn't—it doesn't show the same proportions.

Q. Well then, is it true that you have to have a certain proportion?

A. Well, fairly so, a certain proportion.

(Tr. p. 436, l. 17 to p. 437, l. 21.)

\* \* \* \* \*

Q. (by Mr. Swain). Mr. Martin, does your patent disclose the inventive concept? Does your patent disclose the inventive concept?

A. I don't believe it does. It discloses the design and the method of it, but I don't know that if it concerns the dimensions or anything like that, that you have been trying to get out of me, I don't know.

\* \* \* \* \*

Q. Since you can't tell me what constitutes a sufficient length of the lower inclined portion, can you tell me what constitutes a sufficient length of the vertical portion?

A. No more than the other.

Q. Can you tell me what constitutes a sufficient length of the forward inclined baffle member "I"?

A. Not exactly.

Q. Well, then, how can you take a look at a drawing and say that it doesn't have your concept?

A. It hasn't got the dimensions on it. You haven't got it, have you?

Q. Hauser doesn't have dimensions on it and yet you very positively stated that he doesn't have your concept.

Now I just want you to tell me what the concept is so you can show me in relation to your definition of the concept why Hauser doesn't have it.

A. All I can say it isn't in the same dimensions and proportions.

If a particular design or a particular relationship between the size, angles, or disposition of the particular parts is necessary "to produce a lifting force on the scraper" as required by the claims, that relationship is not shown by the patent in suit. For that reason the patent in suit is invalid because it fails to teach one skilled in the art how to produce the claimed invention. If the appellant argues that his teaching is sufficient, then it is respectfully submitted that the teaching of Adams or Beach is likewise sufficient inasmuch as both of them show the forwardly extending curved upper portion, one of which is approximately identical to that described by the witness Cantonwine, and the other of which is a greatly exaggerated forwardly curving extension. If the Bird patent does not illustrate the invention because some particular relationship between the parts is required, then the appellant's patent is invalid because it, too, fails in the same manner and to the same extent.

Finding 5 is simply a statement by Judge Lemmon made after hearing all of the evidence relating to the alleged invention, that it did not measure up to the inventive yardstick which has been announced in such cases as *Great Atlantic and Pacific Tea Co. v. Supermarket Equipment Corp.*, supra.

**THE PATENT IN SUIT IS NOT INFRINGED.**

Judge Lemmon made the following Findings and Conclusions on validity.

*Findings of Fact.***10.**

That the accused structures do not infringe claims 10 and 11 of said United States Letters Patent No. 2,014,479 in that:

(a) The patent in suit is for an alleged combination of elements in the land leveling art which art is an old and crowded one. At the time the plaintiff made his alleged invention there were well defined types of land levelers and the plaintiff's alleged invention relates to a land leveler of the specific type described in the specification of the Letters Patent in suit and claimed in said claims 10 and 11 which is a device in which the scraper when in scraping positions rests directly on the ground and is unsupported by its wheels, the mounting of the latter being such that in these positions of the scraper the wheels are raised off the ground and the weight of the leveler is carried entirely by the scraper, whereas in the defendants' devices the wheels ride on the ground not only when the scraper is out of engagement with the ground but when it is in scraping positions as well.

(b) In the defendants' devices the operator has complete control of the scraper at all times and there is no lifting effect imparted to the defendants' scraper by virtue of a lifting force on the scraper when the fully loaded scraper is drawn forward, said lifting force limiting the soil penetration of the scraper.



(c) The defendants' scrapers are not tiltably movable into and out of engagement with the ground, as required by claim 10 of the patent in suit.

(d) The defendants' scrapers do not have an upwardly extending back curving forwardly at its top to produce a lifting force on the scraper when the fully loaded scraper is drawn forward whereby excessive soil penetration of the scraper bottom is prevented, as required by claim 10 of the patent in suit.

(e) The scraper of the defendants' devices is not adapted when loading to rest upon the ground to support the draft frame, as required by claim 11 of the patent in suit.

(f) The defendants' scrapers do not have an upwardly extending back curving forwardly at its top to produce a lifting force on the scraper when the fully loaded scraper is drawn forward, said lifting force limiting the soil penetration of the scraper bottom, as required by claim 11 of the patent in suit.

(g) The frame member of the defendants' device is not the equivalent of the "upwardly extending back curving forwardly at its top" required by claim 10 or the "upwardly extending back curving forwardly at its top" required by claim 11 of the patent in suit.

(h) The function and mode of operation of the defendants' devices differ from the function and mode of operation of the device described and claimed in the Letters Patent sued upon.

(i) The evidence shows that the defendants' devices operate in the identical manner whether

the defendants' frame member (which is alleged by the plaintiff to be the equivalent of the "upwardly extending back curving forwardly at its top") is present in the defendants' device or is not present in the defendants' device.

Claim 10 of the patent in suit may be broken down into its various elements as follows:

A land leveler comprising

1. An adjustable scraper

Tiltably movable

Into and out of engagement with the ground,

2. And means

To tiltably operate the scraper;

Said scraper comprising

(A) An inclined bottom portion

(B) And an upwardly extending back

(C) Curving forwardly at its top to produce a lifting force on the scraper when the fully loaded scraper is drawn forward, whereby excessive soil penetration of the scraper bottom is prevented.

As has been previously pointed out in this brief, Martin, in securing his patent over the resistance of the Examiner in the United States Patent Office, (whose resistance was ultimately worn thin by the arguments which the appellant would now like to forget), argued that the "tiltably movable" limitation in the claim was an important one and distinguished over prior art such as McMillan in which the scraper was rigidly secured to the draft frame.

The "tiltably movable" limitation in the claim requires that, to infringe, a device must be of the appellant's particular classification and clearly removes from the claim a device of the type manufactured and sold by Be-Ge and Hauser.

Be-Ge does not have an upwardly extending back curving forwardly at its top. Be-Ge does have a frame member, one portion of which, like the identical portion in Hauser, lies adjacent to the upper edge of the scraper and which, like Hauser, is purely a frame member serving to strengthen the Be-Ge structure. There is nothing in the record to show that that force is sufficient to prevent excessive soil penetration of the scraper bottom. (Tr. p. 96, l. 1 to p. 99, l. 3.)

The testimony relating to the existence of such an upward force is only that of the inventor himself who testified vaguely that at various times and in various places he had noted this phenomenon. The examination of his testimony indicates, however, that it does not amount to the clear and convincing proof required to prove infringement. There is no time or place mentioned, nor is there any specific action to show that the appellant himself operated or really carefully studied the operation of the devices which are alleged to infringe. (Tr. p. 409, l. 12 to p. 411, l. 4.)

The testimony on behalf of Be-Ge is clear and convincing that there is only a negligible, if any force, exerted against the frame member by the upward moving earth.

Mr. Doble testified that tests upon Mr. Gurries' farm (which tests were viewed by Judge Lemmon through the medium of motion pictures (Exhibits T and X)) reveal that the force was so slight that Mr. Doble was able to place his hand between the earth and the frame member and feel no appreciable pressure. (Tr. p. 180, l. 6 to l. 17 inc.) The pressure was insufficient to break the skin, turn the finger nails or in any other manner materially affect the hand. Pressure which is this slight would not lift a Be-Ge scraper which weighs between 1,000 to 2,900 pounds as indicated by the catalog, Exhibit 1-A.

Moreover, the testimony of Albert E. Gurries and of his chief engineer, Mr. White, is conclusive that the lifting force is not wanted in the Be-Ge's structure and, if it were present, they would do everything they could to eliminate it.

Mr. Gurries' testimony was as follows (Tr. p. 293, l. 18 to p. 294, l. 5):

Q. And your scraper blade would have to be supported at all times and be accurately supported with respect to those two sets of wheels?

A. That is correct.

Q. Now, Mr. Gurries, would you, being the designer of this scraper, would you want any other lifting or any other controlling force?

A. No. No lifting force in the scraper, upon the body of the scraper.

Q. In other words, you don't want any force on that scraper over which you do not have actual and absolute control of at all times?

A. That is correct.



Mr. White testified as follows (Tr. p. 324, l. 4 to p. 325, l. 12) :

Q. Well, assume, though, that the dirt does pile up in the bowl and does engage that member "I", it is my recollection that your prior answer that you have never seen the dirt exert enough force to lift the scraper.

A. That is true.

Q. You believe it could under any circumstances?

A. I don't believe so.

Q. If it did, would it be desirable?

A. It certainly would not.

Q. Have you taken that into consideration in your design?

A. We have.

Q. Would that be a force which is beyond the control of the operator?

A. It would.

Q. And therefore undesirable?

A. Correct.

Q. Have you ever put your hand in front of that, the member "I" as the dirt was passing in front of it or passing against it?

A. I have.

Q. What effect have you noticed, if any?

A. Very slight contact with my hand.

Q. Has it bruised your hand?

A. Oh, no, just barely touched it.

Q. It hasn't taken the skin off?

A. No.

Q. What is the weight of that scraper, do you know offhand?

A. The weight of this one in this drawing? There are various widths, which weigh differently.

Q. Take a ten-foot width, what would be the weight of it, would you know?

A. Well, I could be accurate if we look at one of our—

Q. Take a guess?

A. A ten-foot one, well, I think it weighs over a thousand pounds.

The testimony of these witnesses is clear that it is Be-Ge's desire to produce a structure by which the ground may be leveled accurately, rather than by biting chunks out of the ground as the Martin device does. As Mr. Gurries pointed out, our device operates to a plane which is defined by the tractor vehicle and the two bearing wheels of the device. (Tr. p. 290, ll. 1 to 7; p. 293, ll. 2 to 21.) The cutting edge of the scraper blade is then positioned with respect to the plane (Tr. p. 290, ll. 1 to 7 inc.), and, as the blade is drawn over the field it will maintain a predetermined position which will not be altered or varied in any manner by the amount of dirt within it. Furthermore, when the scraper empties, its position to that plane will not be varied. (Tr. p. 291, l. 9 to p. 294, l. 8.)

This is contrary to the mode of operation of Mr. Martin's device in which the blade engages the ground and digs in until it is full, something which cannot happen with the Be-Ge (or Hauser) structure. When the appellant's device is full it comes out of the ground regardless of the wish of the operator, something which cannot happen with the Be-Ge structure. Our structure is designed to provide a scraping edge which is at all times solely under the control of the

operator as are devices of the type illustrated by McMillan and Hauser.

From the foregoing it is clear that claim 10 is not infringed because:

(1) The scraper is not tiltable as required by the claim.

(2) The Be-Ge device is not provided with an upwardly extending back curving forwardly at its top to produce a lifting force on the scraper whereby excessive soil penetration of the scraper bottom is prevented. This is for the reason that if there is any pressure (which is doubted) the same is insufficient to raise the scraper and for the further reason that we go to great lengths to design the device in such a manner that it will not lift contrary to the will of the operator.

Claim 11 is not infringed for substantially the same reasons as previously set forth in connection with our argument relating to infringement of claim 10.

### Claim 11

In a tractor drawn land leveler of the character described,

1. A draft frame  
pivotally connected at its forward end to the tractor
2. And a scraper  
attached to the rear end of the draft frame and adapted when loading to rest on the ground to support the draft frame;

Said scraper  
comprising

- (A) A transversely extending, inclined bottom portion,
- (B) Forwardly extending end walls
- (C) And an upwardly extending back
- (D) Curving forwardly at its top to produce a lifting force on the scraper when the fully loaded scraper is drawn forward, said lifting force limiting the soil penetration of the scraper bottom.

In the first place the accused device does not utilize "a scraper attached to the rear end of the draft frame and adapted when loading to rest on the ground to support the draft frame."

It will be recalled that appellant wore down the Examiner by continued and repetitive arguments wherein he stated (Exhibit D, p. 48, Paper No. 8 dated April 18, 1933):

"Assuming for the purposes of argument that the scraper blade is resting upon a hard surface like a concrete floor, it will be admitted that the wheels of McMillan may be raised off the ground; but it is submitted that such ground disengagement is contrary to the actual mode of operation of the scraper and is contrary to the necessary implications of the patent description."

Further on he indicated that it is also essential to his type of device that the scraper support the draft frame during loading. For example, he stated (Exhibit D, p. 50):



“One must be careful to distinguish between bringing the wheels into ground engagement by or as a result of tilting the scraper and between tilting or moving the scraper subsequent to or as a result of wheel engagement with the ground as is true in both McMillan and Bernard as well as most of the other cited art. There is not only a distinction but a difference since there is a different mode of operation in the two cases. By using the first mode of operation, applicant is enabled to operate the scraper and control its position relative to the draft frame and relative to the ground without requiring the wheels to rest upon the ground.”

He also made the following argument (Claim 29 is claim 10 of the Patent and claim 31 is claim 11 of the Patent. Exhibit D, p. 52):

“It is also the clear intent of these devices that the penetration be limited and determined by their supports, even though they be chains rather than by any soil pressure. Because of this difference in operation claim 29 is believed allowable.

The same remarks apply to newly submitted claims 31 and 32, though these latter claims additionally include the support of the draft frame by the scraper, which is a feature decidedly not present in the cited art.”

Be-Ge does not utilize this feature.

In addition Be-Ge does not utilize “an upwardly extending back curving forwardly at its top to produce a lifting force on the scraper when the fully

loaded scraper is drawn forward, said lifting force limiting the soil penetration of the scraper bottom”.

From the foregoing it is apparent that Claim 11 is clearly not infringed because:

(1) The accused device is not a device “of the character described”. It is of a different type as has been pointed out herein.

(2) The scraper is not attached to the rear end of the draft frame and adapted to rest on the ground to support the draft frame.

(3) The forwardly curving top does not produce a lifting force limiting the soil penetration of the scraper bottom.

Even should the Court feel that the rear frame members of the accused device is the equivalent of a forwardly extending rear scraper frame member the *Court must hold as a matter of law that infringement is lacking*. Assuming that earth does engage the forwardly extending rear scraper portion, and further assuming, contrary to the evidence, that there is a lifting force thereon, the effect of the lifting force is undesired, not wanted, and not used in the Be-Ge structure, and so infringement cannot be found.

It is well known that even though elements of construction are important, function is equally important and function and construction together are more important than terminology. “In order that there be infringement the accused device and the patented device must operate the same.” (*Shell v. Electric Auto Light Co.*, 98 Fed. Supp. 462.)

The case of *Williams v. Hughes*, CCA 10, 109 F. 2d 500, is authority for the proposition that in determining whether a device infringes, the Court must look to the mode or means of operation, the functions, and the effect of the patented device and the accused device. If these are substantially identical, the principle of the patent is appropriated. If they are not, the principle of the patent is not appropriated. Otherwise stated, the test is whether the two devices do the same work in substantially the same way and accomplish substantially the same results. It is apparent that in the instant action the two devices do not accomplish the same results in the same way. Mr. Martin accomplishes his result by a tilting action of the scraper bowl in combination with a lifting effect imparted to the scraper by earth entering the same. Be-Ge utilizes an entirely different mode of operation.

The case of *Holley v. Goldner Sales Co.*, CCA 6, 107 F. 2d p. 494, comprises an analysis of a situation similar to that confronting this Court. The invention related thereto a thermostatically controlled method of utilizing exhaust gases in automobile engines for properly heating the fuel mixture in the intake manifold. The Court stated that the claims which were finally granted were limited to the positioning of the thermostat as to expose it to air currents from the fan as distinguished from one which exposes it merely to the atmosphere surrounding the manifold.

The Court stated (p. 496) :

“ . . . But, even if the District Court had found that appellee's thermostat was reached by some

of these 'air streams' or 'eddies' it would not have infringed appellant's claims as the District Court properly construed them. Had they been construed broadly enough to be infringed by Appellee's thermostat because it is exposed to some of the 'air streams' or 'eddies' under the hood they would have been invalid since Fergus and Trussell had previously disclosed thermostatic devices that were exposed to indirect air currents from the fan.

"... The valve in appellee's device which controls the flow of exhaust gases is positioned differently and functions differently. It is not located in the exhaust manifold but in the passage that leads from the exhaust manifold to the jacket that envelops the inlet manifold. Because of its location, the opposite sides of appellee's valve are not subjected to alternate exhaust discharges that cause it to oscillate but all discharges impinge upon the same side. Moreover, appellee's valve is secured by a toggle spring that resists any tendency there might be to oscillate. The District Court found that any tendency that might exist for the Hupmobile (appellee's) valve to oscillate in response to motor pulsations and in opposition to the resistance offered by the toggle spring would be insignificant as compared with the major movements of the valve that result from increases and decreases of exhaust pressure in response to throttle changes during ordinary driving."

As in the above case, we have claims which have been limited during their prosecution. The Court stated that in the event the arguments of counsel



were ignored and the claims were broadened, the claims would read upon the prior art and be invalid. Then the Court went further and *stated that even though the claimed action might be found, it was so insignificant that infringement would not be found.*

This is directly in line with the testimony of the witness Doble in which he stated that although there may be some pressure on the scraper blade and the upper frame portions thereof, the pressure was negligible and certainly not desired. (Tr. p. 179, line 10, through p. 180, line 17.)

All of the foregoing, of course, assumes that the rear frame member of the Be-Ge device is the equivalent of a forwardly extending rear scraper member and ignores completely the testimony of the witnesses Doble, Gurries and White. In addition, any such assumption is contrary to the visual evidence, to-wit, the motion pictures (Exhibits T and X) which showed conclusively that the devices operated in the same way with or without the alleged forwardly extending member.

The tests show several things:

1. The tests show that the Be-Ge scraper operates in the same manner whether the forwardly extending frame member is retained in its normal position or whether it is removed leaving a straight vertical rear surface to the scraper.

2. The tests also show that scrapers of the Towner-Martin type operate in the same manner whether the angle iron is in position or not. (It must be kept

in mind that when the Towner-Martin device was operated without the angle iron, the weight of the angle iron was maintained by allowing it to lie on top of the scraper out of contact with the earth.)

3. The tests also showed conclusively that in the operation of the Be-Ge scraper, control of the cutting edge was maintained solely by the positioning of the rear wheels, in the same manner as in the McMillan and Hauser structures.

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### **THE APPELLANT'S BRIEFS.**

In this commentary, the appellees will follow the appellant's outline insofar as possible.

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### **OPENING BRIEF.**

#### **II. THE INVENTION IN SUIT. (APPELLANT'S ANALYSIS.)**

In his analysis of the invention in suit, appellant admits that his scraper member is attached to the rear end of the draft frame in such a manner that it could be tilted from a normal land leveling position to unloading or dumping position. The use of the word "tilt" herein must be the same as Mr. Martin used throughout the prosecution of his application and must refer to the pivotal connection between the scraper and the draft frame and cannot relate to the unitary construction adopted by the appellees.

On page 5 of his brief, appellant refers to the lifting force which is obtained by the operative en-

gagement of the earth with the forwardly curving extension of the scraper. It has been previously shown in our brief at pages 35-37, 45-46 that there was no lifting force in the accused Be-Ge scraper and that there is no lifting force in the Towner-Martin scraper which was tested. It is clear, therefore, that the appellant's own analysis of his "invention in suit" precludes any possibility of a holding that the appellees have copied the same.

**Mental Concept. (Appellant's Analysis.)**

Under this heading appellant seeks to disregard the language of the claims and to describe the alleged invention in what he chooses to call the "language of the streets". The "language of the streets" is not proper to the interpretation of a patent and the inventor is restricted to the "language of the claims". The reason for evading the language of the claims is transparent; the language of the claims simply does not include or read upon the accused Be-Ge structure.

However, let us examine the so-called "Martin mental concept". It is urged that the principal feature of the Martin invention is a forwardly curving extension affixed to the top of the upwardly extending back portion of Martin's *prior* scraper.

The inventor in his brief on page 9 now admits that the forwardly curving extension must be "of such a size and shape" that it will produce a lifting force upon the scraper. This conforms to the appellant's fuzzy description of his invention on cross-examina-

tion. (Tr. pp. 427 to 439.) If size and shape are essential, as they admittedly must be, then the patent in suit is invalid for the reason that the size and shape are not taught in the patent and thus the patent does not describe the invention in clear and concise terms as required by the patent statutes.

In *American Lava Co. v. Steward*, 155 Fed. 731, 736, CCA 6 (1907), the Court invalidated the patent and said:

“But in the then state of the art he was bound to differentiate his structure from those which preceded him; and especially is this so where the whole merit of his invention depends upon some peculiarity in the elements he employs. We think it may be affirmed as a rule resting upon the fundamental principles of patent law that, where the essence of the invention is the location, form, size or any other characteristic of the means employed, the patentee must distinctly specify the peculiarities in which his invention is to be found. . . . (*Germer Stove Co. v. Art Stove Co.*, 150 Fed. 141, 80 CCA 9; *Bullock Electric Co. v. General Electric Co.*, 149 Fed. 409, 79 CCA 229.)”

In the middle of page 9 appellant also states that no forwardly curving extension which will arrest the upwardly moving soil to produce a lifting force on the scraper is to be found anywhere in the prior art. This is at direct variance with the teaching of the Bunch patent.

The appellant goes on to say that the effect of arresting the upwardly moving train of soil by the



alleged new element is "to transform a loose moving train of soil into a generally static, solidly packed, rigid connection or brace" between the top of the upwardly extending back and the ground. This simply does not happen with the Be-Ge structure. The witness Doble and the witness White testified that they were able to place their hands comfortably between this so-called rigid connection or brace and the rear of the bowl without hurting their hands or without any undue pressure being exerted upon their hands. If there were, indeed, any kind of "rigid brace", the witnesses Doble and White would not have been able to put their hands between the soil and the forwardly curved rear portion. (Tr. pp. 180, 293, and 324.)

Apparently there are three different ways of defining the so-called invention herein and none of them fit the Be-Ge device.

(1) The first is the definition of the invention given by the claims of the patent in suit. Each of these claims calls for a tiltable bowl and a forwardly directed curved upper portion of the blade which was adapted to be engaged by the earth and thus lift the blade out of the earth. It has been shown that the Be-Ge scraper is not tiltable and that the device does not operate in the manner described in the claims.

(2) The second definition of the alleged invention is the nebulous theorizing advanced by the appellant himself and from this explanation two

things are apparent: that the alleged invention is not disclosed in the patent in suit and that the appellees do not utilize the alleged invention.

(3) The third method of expressing the alleged invention is found in the appellant's brief and it is apparent that the appellees do not utilize the alleged invention because (a) we do not utilize a so-called tiltable scraper; and (b) we do not use a forwardly extending portion "of such a size and shape" as to produce the alleged desired result of a rigid brace or connection.

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### III. INFRINGEMENT. (APPELLANT'S ANALYSIS.)

The appellees agree that the claims of the patent measure the invention. The claims having defined the alleged invention and the same not being present in the Be-Ge device, the claims are not infringed.

The appellant urges the so-called "doctrine of equivalents". It must be assumed that it is the appellant's contention that the tiltable mounting of his scraper is the equivalent of the rigid mounting of the Be-Ge scraper. Nothing could be further from the truth. The distinction is pointed out by the inventor himself in his file wrapper where he states (Exhibit D, p. 50):

"... There is not only a distinction but a difference since there is a different mode of operation in the two cases. By using the first mode of operation applicant is enabled to operate the scraper and control its position relative to the draft frame

and relative to the ground without requiring the wheels to rest upon the ground”.

Appellant urges the proposition that the purpose and intent of an infringer do not in any way affect the question of infringement. The intent of the appellees is not to utilize any lifting effect whatsoever and as has been previously shown, the law is that where a function is not utilized, although it may be present (which is not admitted here), the claims are not infringed. See pages 42-43 of this brief.

The appellant urges that where a patent covers a function never before performed, the patent is entitled to a broad and liberal construction, and claims for himself a so-called “pioneer patent”. The present patent is not a pioneer patent inasmuch as the concept which is referred to by Martin is found in the Bunch patent.

**B. Infringement Has Been Conclusively Proven by Plaintiff Herein. (Appellant's Analysis.)**

The appellant claims that he has proven infringement conclusively and points to his unsupported testimony. It is directly contrary to the mode of operation described by the witnesses Gurries, White and Doble. The learned District Judge rejected the inventor's testimony and accepted that of Gurries, and Doble and White.

On page 20 appellant quotes from his testimony relating to whether or not the Be-Ge device is a tiltably movable scraper. If the Be-Ge device is tiltable, then so is Hauser's, McMillan's and several others.

The appellant was also asked whether, in the operation of the Be-Ge device, earth engaged the upper frame member and prevented further soil penetration of the device. The appellant indicated that it did. The lower Court saw visual evidence in the motion pictures that it did not. The Trial Judge found the pictures to be far more reliable than the unsupported testimony of an interested party.

**C. Infringement Admitted by the Defendants' Expert Witness William A. Doble. (Appellant's Analysis.)**

With respect to the alleged admissions of the witness William A. Doble, an unpleasant point is raised. The appellant makes a great deal out of the testimony of this witness and quotes him extensively. However, the witness' testimony is not presented fairly to this Court.

For example, on page 28, line 10 of the brief, certain testimony is quoted. However, certain very material portions of the answer are omitted. The answer should be as follows:

“With respect to the ground, *but not with respect to the frame*”. (Emphasis supplied.)

In line 14 of the same page there is an answer of the witness Doble which is given without the benefit of the preceding question. The preceding question is (Tr. p. 171 ll. 9-18 inclusive).

“Q. Therefore, there would be some tilting if the scraper moves into and out of the ground?

A. No, I won't say that, because that indicates there might be a tilting of the scraper with re-



spect to the frame, where there is no such tilting.

Q. Then——

A. There is tilting, if you want to define it that way, of the parts of the scraper and the draft frame with respect to the earth and to the tractor as the draft frame is raised or lowered with respect to the ground.”

Again on page 31, lines 3 and 4, the complete answer of the witness is not given and it is considered that it is pertinent. It should read as follows (Tr. p. 176, ll. 9-11 incl.):

“A. In a sense it would be a part of the bowl the same as the draft frame is part of the bowl, but the prime function of it is for stiffening and supporting purposes.”

Again on page 31 the entire answer beginning at line 15 is omitted by the appellant and on the same page, beginning at line 26, the entire answer is not given and should read as follows (Tr. p. 180, ll. 9-17 incl.):

“A. To the extent of that pressure it certainly would; but I—— as I have pointed out before, that pressure is so minute that it is not noticeable in the operation of defendant’s structure and the fact is I haven’t noticed it in plaintiff’s structure, and I felt the dirt in back of the forwardly extending upper portion of the bowl and it is soft and loose and I haven’t seen wherein that portion of the bowl in any way affected the penetration of the cutting edge into the ground.”

Appellee’s counsel is reluctant to raise questions of this sort and only does so because he is compelled to

put the testimony of the witness Doble in the proper light. The testimony of that witness when taken as it should be taken is clear and convincing. The trial judge rejected these arguments and gave credence to the testimony of this witness. By carefully editing anybody's comments or testimony, probably any desired interpretation could be tortured therefrom but it is respectfully submitted that the truth can be obtained only from the entire testimony and not from these isolated portions.

On page 33, the answer quoted in line 3 thereof is incomplete as is the answer quoted in line 18 thereof. The answer quoted on page 34, line 7, is incomplete.

On page 34 of his brief, the appellant urges that the fourth element of Claim 11 was admitted to be present by the witness Doble. Nothing could be further from the truth. The testimony of the witness Doble was conclusively to the contrary and was that there might be a slight lifting force but that if there was, it was negligible, that it was not used, and that it certainly had no lifting effect upon the Be-Ge device.

The witness Doble did not make any such admissions as claimed by the appellant and claims 10 and 11 are not infringed.

**D. Mode of Operation, Function and Result. (Appellant's Analysis.)**

The appellant attempts to bolster his comments regarding equivalency by trying to show, on pages 34 to 45, that the devices are equivalent in their operation, function and result.

He first relies on his own testimony. This testimony is contrary to the motion pictures, Exhibits T and X. These show that the operation of the Be-Ge devices with and without the alleged forwardly extending rear portion is identical, and that there is no lifting effect whatsoever. This being the case, the alleged mode of operation, function and result is entirely different and the desired result is lacking.

In the quotation in the appellant's brief on page 39, a portion of the answer beginning at line 18 of that page is omitted. Pertinent portions of the answer quoted on line 1 of page 40 are omitted. Here, again, certain selected portions of the witness Doble's testimony are tortured from their context.

The answer quoted at page 43, line 11, is incomplete. The complete answer places a different aspect upon the testimony.

The appellant criticizes some of the prior art devices because they utilize an angle iron brace of the same type as shown in the Towner-Martin land leveler. He totally ignores the forwardly extending rear plate portions of the type which are at an angle of between 30 and 60 degrees at the rear portion such as illustrated by Adams (Fig. 1), Savage (Fig. 1), Spreyer (Fig. 1) and Wood (Fig. 3).

#### 3. Tests Performed by Appellees. (Appellant's Analysis.)

The appellant criticizes the appellees' tests shown in Exhibit X and states that the principal reason why these tests were of no value is that the wheeled tractor used for these tests did not provide sufficient drawbar

pull, because of lack of traction, whereby the mode of operation, function and result of claims 10 and 11 of the patent in suit will result. There is no teaching in the patent in suit that a tractor of a particular horsepower is required and as indicated by the witness White, the tractor which was used was that recommended by the Be-Ge people in their circulars. (Tr. p. 333, ll. 1-7.) The appellant does not comment upon the fact that the motion pictures indicated that the Be-Ge devices work equally well whether or not there was a so-called forwardly extending rear member.

The appellant further criticizes these tests upon the ingenious grounds that "the soil upon which the defendants ran their tests was too hard for the invention of Claims 10 and 11 of the patent in suit to operate in the manner stated in the patent in suit."

There is no teaching in the patent in suit that this invention can be made to work only on particular types of soil. Are these claims to be further limited by this ingenious argument to a device which infringes only on a particular soil, but which does not infringe when it operates on other soil? Does infringement occur only in Bakersfield and in the Imperial Valley and not in Salinas, Sacramento and elsewhere?

It must be concluded that there is no infringement of the claims of the patent in suit.

**Validity—A. Over the Prior Art. (Appellant's Analysis.)**

The appellant claims that a prior, accidental or unrecognized use or disclosure cannot act as anticipation but chooses to ignore the Bunch disclosure which is



not accidental and which has been recognized. Bunch specifically points out (p. 2, c. 2, ll. 16 and following) that there is a lifting effect. For that reason, all of appellant's list of authorities seems of little value.

For the same reason it does not appear that appellant's alleged contribution falls within the quotation from Walker, Section 57, quoted by the appellant on page 49 as follows:

"The reason of this rule arises out of that point of patent law policy, which rewards persons for teaching the public how to perform processes and construct things which nobody else in the United States knew how to perform or to construct, and relevant to which no adequate information could be found in any public patent or printed publication anywhere in the world."

The Bunch patent was available to anyone. For this reason, Mr. Martin is not entitled to a reward for teaching the public how to construct something Bunch had already taught them.

To further bolster his argument, appellant relies upon a quotation from the transcript and again fails to give the complete answer indicated at line 1, page 53, of its brief.

The appellant urges that the appellees have found nothing better than the prior art relied upon by the Patent Office. This is not a fact. Here again appellant quoted from the testimony of the witness Doble and again saw fit to eliminate a portion of the answer of that witness on page 58, line 13 of his brief. The witness did indicate that the patents were all in the

same general class and that some showed some elements better than others. As a matter of fact, the witness specified that McMillan, Bird, Langdon, Wood and others were pertinent. Much of the art relied upon, and certainly the Bunch patent, was not cited by the Patent Office during the prosecution of the application for the patent in suit. Hauser patent No. 1,759,982 was probably not carefully considered by the Patent Office inasmuch as it was cited only for the purpose of requiring division and was *not* relied upon heavily by the Examiner (File wrapper, page 27, Ex. D).

It is respectfully submitted that since Be-Ge did rely upon some patents which were not found by the Patent Office, including particularly Bunch, the doctrine expressed by the Hon. Judge Fee in *Jacuzzi v. Berkeley Pump Company*, 191 F. 2d 632 at 634, is pertinent:

“But, further, a great many of the patents, which were brought to light in this lawsuit and considered by the Trial Court, had not been previously considered by the Patent Office. Even one prior art reference, which has not been considered by the Patent Office, may overthrow the presumption of validity, and, when the most pertinent art has not been brought to the attention of the administrative body, the presumption is largely dissipated. Such is the case here.”

The appellant criticizes the Hauser patent at page 59 of his brief by stating:

“Another reason why Claims 10 and 11 of the patent in suit were clearly allowable over Hauser is that the various elements of the Hauser scraper

member were *not proportioned* in such a manner as to create the new mode of operation, function and result of the invention of Claims 10 and 11 of the Martin patent.”

These proportions which appear to be important now are not disclosed in the patent in suit and, as a matter of fact, are somewhat vague. Martin found them vague as he was unable accurately to pinpoint exactly what proportions, angles and particular relationship of the parts was required. (Tr. pp. 427 to 439.) Even the quotation which the appellant relies upon to show that the Hauser device does not utilize the same proportions seems to imply that if the proportions were correct, probably the Hauser device would be satisfactory since the only criticism of Hauser which appellant makes is the fact that it does not utilize the particular proportions, etc.

In quoting the testimony of the witness Doble, to support his cause, however, appellant again fails to give the complete answer at line 10, page 61.

It is clear that the prior art which is relied upon by the Appellees is not merely cumulative but shows important references which were not relied upon by the Patent Office.

### **3. Individual Prior Art Structures. (Appellant's Analysis.)**

Be-Ge has analyzed the prior art structures extensively in this brief and will not comment upon the appellant's analysis of them other than to point out that the analysis of the Bunch patent on page 66 of the appellant's brief is entirely erroneous.

**B. PLAINTIFF'S STRUCTURE IS A TRUE INVENTIVE COMBINATION AND HAS UTILITY. (APPELLANT'S ANALYSIS.)**

The appellant criticizes the evidence introduced by the Appellees including the motion pictures and the testimony of the witness Doble. The motion pictures showed clearly that the Be-Ge device would work equally satisfactorily with or without the angle iron portion at the rear end thereof and also that the Towner-Martin scraper operated satisfactorily with or without the forwardly extending rear portion.

Moreover, the witness Doble testified that he had examined the Be-Ge structure, with and without the added frame portion, and that **AS TO THOSE DEVICES THERE WAS NO LIFTING EFFECT.** (Tr. p. 180, ll. 2 to 24.) To the same effect see the testimony of White (Tr. p. 322, l. 1 to p. 325, l. 11).

This conclusively shows that the alleged invention is not used in the Be-Ge device. It also shows that in a device of this type the invention has no utility.

The appellees do not infringe the claims of the patent in suit and do not admit utility. As a matter of fact, the appellees go to great length to avoid the use of the alleged inventive concept.

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**THE APPELLANT'S REPLY BRIEF.**

The appellant's reply brief is of course directed to the brief which the appellees filed in the lower Court and does not relate particularly to the matters in this brief. However, certain comments with respect to the reply brief are necessary. For example, on page four



of the reply brief, Martin states that Claims 10 and 11, which were the claims sued upon, are not limited to a pivoting action between the scraper and the frame. We believe we have shown this not to be the case and believe that the only interpretation of the claims which is justified requires as an essential that the scraper must be pivotally connected to the frame and cannot be rigidly secured to the frame.

In this connection it should be noted that the file wrapper arguments to which we have referred are arguments of a general nature and were made by Martin to distinguish his invention generally from the prior art. For the most part, the arguments to which we refer do not relate to specific claims.

It is interesting to note the assertion in the reply brief that Be-Ge changed its position and placed its principal reliance upon the Bunch patent rather than the Hauser patent. Nothing could be further from the truth. Be-Ge relies upon Bunch, Hauser, and many other prior art patents.

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### CONCLUSION.

The Court of Appeals must affirm the judgment of the District Court.

The Martin patent is clearly invalid as each and every element thereof and the function which is attributed to that element is found in the prior art.

The patent in suit is clearly not infringed by the Be-Ge device because the Be-Ge scraper is not "tilt-

ably movable'' into and out of engagement with the ground and because Be-Ge does not provide a forwardly extending member which is adapted to be engaged by the earth to limit the penetration of the scraper into the ground.

If the claims of the patent in suit are interpreted sufficiently broadly to read upon the Be-Ge structure, then they must also read upon the prior art.

We believe this Court must adopt the findings of the learned trial judge, Dal M. Lemmon, who saw the witnesses and determined which of the two bodies of conflicting testimony should be believed.

Dated, San Francisco, California,  
October 24, 1955.

Respectfully submitted,

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